

1
2
3
4 **UNITED STATES DISTRICT COURT**
5 **DISTRICT OF NEVADA**
6

7 In re GARY PHILLIP MCPHERSON,)
8 Debtor.)
9 _____)

10 GARY PHILLIP MCPHERSON,)
11 Plaintiff,)

12 vs.)

13 BANK OF AMERICA, N.A.,)
14 Defendant.)
15 _____)

3:14-cv-00543-RCJ

ORDER

16 This is an adversary proceeding, (*see* Adv. No. 13-ap-05057-BTB), arising out of
17 Plaintiff’s Chapter 13 bankruptcy case, (*see In re McPherson*, No. 13-bk-50685-BTB).
18 Defendant Bank of America, N.A. (“BOA”) has asked the Court to withdraw the reference of the
19 adversary proceeding. For the reasons given herein, the Court denies the motion.

20 **I. LEGAL STANDARDS**

21 The Supreme Court long ago ruled that a judge not afforded the protections of life tenure
22 and irreducible salary given to judges under Article III of the Constitution, such as a bankruptcy
23 judge, cannot enter final judgments on matters traditionally decided by Article III judges. *See*
24 *Dunmore v. United States*, 358 F.3d 1107, 1114 (9th Cir. 2004) (citing *N. Pipeline Constr. Co. v.*
25 *Marathon Pipe Line Co.*, 458 U.S. 50 (1982)). Congress amended the Bankruptcy Code to

1 conform to this ruling, distinguishing “core” bankruptcy proceedings from “non-core”
 2 proceedings. *Id.* Congress has enumerated what it considers to be core proceedings, *see id.*
 3 (citing 11 U.S.C. § 157(b)(2)), but it has not enumerated non-core proceedings, *see id.* “Non-
 4 core” proceedings are those that “do not depend on the Bankruptcy Code for their existence and
 5 . . . could proceed in another court.” *Id.* (citing *Sec. Farms v. Int’l Bhd. of Teamsters*, 124 F.3d
 6 999, 1008 (9th Cir. 1997)).

7 A bankruptcy court may hear and finally determine bankruptcy cases under Title 11 and
 8 proceedings arising under Title 11 or arising in a case under Title 11. *See* 11 U.S.C. § 157(b)(1).
 9 A bankruptcy court may hear a non-core proceeding but must submit proposed findings of fact
 10 and conclusions of law to the district court for final determination de novo. § 157(c)(1). The
 11 Ninth Circuit has adopted the Fifth Circuit’s reasoning in distinguishing three types of
 12 proceedings: (1) those “arising under” Title 11; (2) those “arising in” a case under Title 11; and
 13 (3) those “related to” a case under Title 11, which are the three categories of cases over which
 14 district courts have subject matter jurisdiction pursuant to 28 U.S.C. § 1334(b):

15 28 U.S.C. § 157(b) defines core proceedings as ones “arising under title 11,
 16 or arising in a case under title 11,” and gives a nonexhaustive list of types of core
 17 proceedings. “Arising under” and “arising in” are terms of art. They are two of the
 18 three categories of cases over which district courts have jurisdiction under 28 U.S.C.
 19 § 1334(b). The third category includes cases “related to” a case under title 11. As
 20 the Fifth Circuit has explained,

19 Congress used the phrase “arising under title 11” to describe those
 20 proceedings that involve a cause of action created or determined by a
 21 statutory provision of title 11 The meaning of “arising in” proceedings
 22 is less clear, but seems to be a reference to those “administrative” matters that
 23 arise only in bankruptcy cases. In other words, “arising in” proceedings are
 24 those that are not based on any right expressly created by title 11, but
 25 nevertheless, would have no existence outside of the bankruptcy.

23 The court concluded: “If the proceeding does not invoke a substantive right created
 24 by the federal bankruptcy law and is one that could exist outside of bankruptcy it is
 25 not a core proceeding; it may be related to the bankruptcy because of its potential
 effect, but . . . it is an ‘otherwise related’ or non-core proceeding.”

25 *In re Eastport Assocs.*, 935 F.2d 1071, 1076–77 (9th Cir. 1991) (citations omitted) (quoting *In re*

1 *Wood*, 825 F.2d 90, 96–97 (5th Cir. 1987) (footnotes omitted)).

2 Upon motion or sua sponte a district court may withdraw, in whole or in part, any case or
3 proceeding under § 157. 11 U.S.C. § 157(d). A district court must upon timely motion withdraw
4 a proceeding if it determines “that resolution of the proceeding requires consideration of both
5 title 11 and other laws of the United States regulating organizations or activities affecting
6 interstate commerce.” *Id.* The party moving for withdrawal has the burden of persuasion. *See In*
7 *re First Alliance Mortg. Co.*, 282 B.R. 894, 902 (C.D. Cal. 2001).

8 Although a bankruptcy court may not finally determine non-Title 11 issues, the presence
9 of such an issue alone does not mandate withdrawal of the reference. *In re Vicars Ins. Agency*, 96
10 F.3d 949, 953 (7th Cir. 1996). Rather, withdrawal is mandatory only “in cases requiring material
11 consideration of non-bankruptcy federal law.” *Sec. Farms*, 124 F.3d at 1008. Put differently,
12 “mandatory withdrawal is required only when those issues require the interpretation, as opposed
13 to mere application, of the non-title 11 statute, or when the court must undertake analysis of
14 significant open and unresolved issues regarding the non-title 11 law.” *Id.* at 954. Permissive
15 withdrawal is allowed, however, “for cause shown,” 11 U.S.C. § 157(d), which a district court
16 determines by considering “the efficient use of judicial resources (which is enhanced when non-
17 core issues predominate), delay and costs to the parties, uniformity of bankruptcy administration,
18 the prevention of forum shopping, and other related factors.” *Sec. Farms*, 124 F.3d at 1008.

19 **II. DISCUSSION**

20 Withdrawal is mandatory if the issues in the adversary proceeding require material
21 consideration of non-bankruptcy federal law. The claims in the present Adversary Complaint
22 (breach of contract, breach of the implied covenant of good faith and fair dealing, and
23 conversion) require only the interpretation of state law. Therefore, withdrawal is not mandatory.
24 The Court may withdraw the reference, however, “for cause shown,” after considering the factors
25 of efficiency (which is enhanced when non-core issues predominate), delay and costs to the

1 parties, uniformity of bankruptcy administration, the prevention of forum shopping, and other
2 related factors.

3 First, the Adversary Complaint consists entirely of non-core claims. The present contract
4 and tort claims are non-core, “related to” claims over which the district court has jurisdiction
5 under 28 U.S.C. § 1334(b) and which the bankruptcy court cannot finally determine because they
6 are not created or determined by Title 11 and are not administrative bankruptcy matters. *See In re*
7 *Eastport Assocs.*, 935 F.2d at 1076–77. If the Court were to deny withdrawal of the reference, it
8 would then have to consider all dispositive motions anew and hold an entirely new trial (or at
9 least review every single aspect of the trial in the Bankruptcy Court de novo) after the
10 Bankruptcy Court had already held those proceedings, because the Bankruptcy Court does not
11 have the constitutional authority to finally rule on any of the present claims. *See Stern v.*
12 *Marshall*, 131 S. Ct. 2594, 2608–20 (2011). The first and second factors (judicial efficiency, and
13 delay and cost to the parties) therefore weigh very heavily in favor of withdrawal. The third
14 factor (uniformity of bankruptcy administration) is not implicated in this case because there are
15 no core claims in the Adversary Complaint. Finally, there is no indication of forum shopping by
16 either side. Although mandatory withdrawal does not apply, the factors weigh heavily in favor of
17 permissive withdrawal.

18 Plaintiff, however, argues that the motion is simply untimely under Local Bankruptcy
19 Rule 5011(b) because it was filed after BOA answered, and that a litigant who fails to timely
20 object to non-core claims being heard in the bankruptcy court impliedly consents to the
21 bankruptcy court hearing those matters and issuing a report and recommendation for the district
22 court to later review de novo. *See In re Bellingham Ins. Agency, Inc.*, 702 F.3d 553, 569–70 (9th
23 Cir. 2012). In that case, the Court of Appeals ruled that a bankruptcy judge could not under
24 *Stern* constitutionally enter a final judgment on claims that exist outside of the bankruptcy code,
25 regardless of whether Congress had labeled the claim as “core” or “non-core” by statute. *See id.*

1 at 565. The resulting problem was that the bankruptcy court did not have the constitutional
2 power to finally determine the case, but because Congress had labeled the relevant claim as
3 “core,” neither did the bankruptcy court have the statutory power to enter proposed findings of
4 fact and conclusions of law, leaving the bankruptcy court no apparent ability to address the claim
5 at all. *See id.* The Court of Appeals cured the “gap in this framework” by reasoning that
6 Congress intended via the post-*Northern Pipeline* amendments to the Bankruptcy Code to invest
7 the bankruptcy courts with the maximum amount of jurisdiction constitutionally permitted, and
8 that would surely include the power to enter proposed findings of fact and conclusions of law as
9 to core claims in addition to non-core claims. *See id.* at 565–66. The Court of Appeals noted that
10 the bankruptcy court in *Stern* itself had purported to enter a final ruling, but the district court had
11 treated that ruling as findings of fact and conclusions of law and reviewed it de novo, and the
12 *Stern* Court had taken no issue with that procedure. *Id.* at 566. The Supreme Court granted
13 certiorari to review that part of the opinion, and it affirmed because the district court had, as in
14 *Stern*, reviewed the bankruptcy court’s ruling de novo. *See Exec. Benefits Ins. Agency v. Arkison*,
15 134 S. Ct. 2165, 2168 (2014) (“We hold today that when, under *Stern*’s reasoning, the
16 Constitution does not permit a bankruptcy court to enter final judgment on a bankruptcy-related
17 claim, the relevant statute nevertheless permits a bankruptcy court to issue proposed findings of
18 fact and conclusions of law to be reviewed de novo by the district court. Because the District
19 Court in this case conducted the de novo review that petitioner demands, we affirm the judgment
20 of the Court of Appeals upholding the District Court’s decision.”).

21 The present case does not rely upon *Arkison*, because the Adversary Complaint contains
22 only non-core claims, and it has long been statutorily and constitutionally uncontroversial that a
23 bankruptcy court may issue proposed findings of fact and conclusions of law as to non-core
24 claims. Nor does Plaintiff appear to argue that Defendant has waived its right to a final ruling in
25 the District Court versus a final ruling in the Bankruptcy Court. If that issue were at play, the

1 Court would likely stay the case and await the Supreme Court’s ruling in *Wellness Int’l Network*
2 *v. Sharif*, No. 13-935, in which the Supreme Court has granted certiorari to resolve, *inter alia*,
3 “whether Article III permits the exercise of the judicial power of the United States by the
4 bankruptcy courts on the basis of litigant consent, and if so, whether implied consent based on a
5 litigant’s conduct is sufficient to satisfy Article III.”¹

6 Here, Plaintiff here appears to argue only that Defendant has waived its right to
7 withdrawal of the reference, not its right to de novo review in the District Court after hearing and
8 issuance of proposed findings of fact and conclusions of law in the Bankruptcy Court. Plaintiff
9 first argues that Defendant must ask the bankruptcy judge in the first instance to determine
10 whether certain claims are core or non-core, and that until that determination is made, a motion
11 to withdraw the reference is premature. The relevant statute notes that “[t]he bankruptcy judge
12 shall determine, on the judge’s own motion or on timely motion of a party, whether a proceeding
13 is a core proceeding under this subsection or is a proceeding that is otherwise related to a case
14

15 ¹The Court of Appeals in *In re Bellingham Ins. Agency* also noted that the Bankruptcy
16 Code permitted bankruptcy judges to enter final rulings in non-core proceedings with the consent
17 of the parties and that it had long been held that a litigant could waive his constitutional right to a
18 final determination of a non-bankruptcy claim by an Article III judge, a right that is personal, not
19 structural. *See id.* at 567 (citing *CFTC v. Schor*, 478 U.S. 833, 848 (1986)). The court then
20 reasoned that if the bankruptcy court had the statutory and constitutional ability to enter a final
21 judgment on a non-core, non-bankruptcy claim where the only objecting party had waived its
22 right to an Article III judge, it surely had the ability to enter a final judgment on a core, non-
23 bankruptcy claim under otherwise identical circumstances, and that was the case there. *See id.* at
24 567–68. The Court of Appeals found implied consent from the facts that the losing party in the
25 Bankruptcy Court had: (1) asked the district court to stay a determination of the motion to
withdraw the reference so that the bankruptcy court could rule upon the pending motion for
summary judgment; (2) withdrew its motion to withdraw the reference after it lost the motion for
summary judgment; (3) did not argue the bankruptcy court’s lack of authority to enter summary
judgment either in its subsequent appeal to the district court or in its briefs to the Court of
Appeals; and (4) had only filed a motion in the Court of Appeals to vacate the bankruptcy court’s
judgment on the eve of oral argument in the Court of Appeals. *See id.* at 568. The Sixth and
Seventh Circuits have ruled to the contrary, and the Supreme Court has granted certiorari in
Sharif to determine the issue, which it left unresolved in *Arkison*. Again, however, the issue does
not appear to present itself here.

1 under title 11.” 28 U.S.C. § 157(b)(3). But § 157(d) permits a district court to withdraw the
2 reference, and it does not appear to require the Court to await the Bankruptcy Court’s
3 determination of whether certain claims are core or non-core before making its subsection (d)
4 analysis. In any case, the Bankruptcy Court’s determination would be subject to de novo review,
5 and it is clear that the claims here are non-core, so there is simply no point in requiring
6 Defendant to request the Bankruptcy Court’s opinion on the matter before ruling on the present
7 motion. The failure to request the Bankruptcy Court’s opinion on core versus non-core claims
8 before filing a motion to withdraw the reference cannot be read as an implied waiver of the right
9 to request withdrawal.

10 Plaintiff next argues that under the local rules a motion to withdraw the reference must be
11 filed before an answer is filed. This is a better argument. The relevant time is when an answer is
12 due, not when it is filed, but Plaintiff is correct that the present motion is untimely. Local
13 Bankruptcy Rule 5011(b) requires that a motion to withdraw the reference of an adversary
14 proceeding “must be served and filed on or before the date on which an answer, reply, or motion
15 under [Bankruptcy Rule] 7012 or 7015 is first due. . . . However, [it] may be served and filed no
16 later than fourteen (14) days after service of any pleading containing the basis for the motion . . .
17 .” Local R. Bankr. Prac. 5011(b). Bankruptcy Rule 7012 requires an answer to be filed within
18 thirty days of the issuance of the summons. The first summons in this case was issued on
19 September 9, 2013. Plaintiff later admitted that service of the September 9, 2013 summons had
20 been improper, and because the Bankruptcy Rules require service of a summons within ten days
21 of issuance, Plaintiff requested a new summons be issued. The Bankruptcy Court granted the
22 motion and issued a new summons on April 11, 2014, such that an answer was due under
23 Bankruptcy Rule 7012 and Civil Rule 6 by Monday, May 12, 2013. BOA answered on that date
24 and did not move to withdraw the reference until October 6, 2014. The Court therefore finds that
25 the present motion to withdraw the reference is untimely.

1 Plaintiff also argues that Defendant waived the right to request withdrawal of the
2 reference and that denial of withdrawal will conserve judicial resources. The Court need not
3 address these arguments. The motion is simply untimely under the local rules.

4 In reply, Defendant argues that the present motion should be considered timely so long as
5 “made as promptly as possible in light of the developments in the bankruptcy proceeding.” *Sec.*
6 *Farms*, 124 F.3d at 1007 n.3 (quoting *In re Baldwin–United Corp.*, 57 B.R. 751, 754 (S.D. Ohio
7 1985)). But the Local Bankruptcy Rules are in addition to the Bankruptcy Rules, and the Local
8 Rules impose the deadline noted, *supra*. Bankruptcy Rule 5011 does not impose any particular
9 deadlines, and Local Bankruptcy Rule 5011 is therefore not in conflict with it. In any case, the
10 “totality of the circumstances rule” urged by Defendant does not aid Defendant here. In *Security*
11 *Farms*, the defendant moved to withdraw the reference six days after removal to the district court
12 and automatic referral to the bankruptcy court. *See id.* The present Adversary Proceeding has
13 always been in the Bankruptcy Court, and Defendant answered there almost five months before
14 moving to withdraw the reference. Defendant focuses on the lack of substantive developments in
15 this matter in the Bankruptcy Court. That fact favors Plaintiff if it favors either side; withdrawal
16 would tend to result in judicial inefficiency in cases where there had already been meaningful
17 substantive activity in the bankruptcy court. But the fact probably favors neither side. The kinds
18 of circumstances that might favor a later withdrawal would be a ruling by the bankruptcy judge
19 that one or more claims are non-core and/or non-bankruptcy claims (in cases where the answer is
20 in fact unclear) or where an adversary complaint is later amended to include non-core and/or non-
21 bankruptcy claims where it previously contained no such claims, i.e., the same kinds of
22 circumstances that would permit removal under § 1446(b)(3) after thirty days. This case has
23 always been in the Bankruptcy Court and has always very clearly included only non-bankruptcy
24 claims.

25 Next, Defendant argues there will be no prejudice to Plaintiff from a withdrawal, but

1 neither Bankruptcy Rule 5011 nor Local Bankruptcy Rule 5011 require any consideration of
2 “prejudice” to deny withdrawal of the reference for untimeliness, and the Court of Appeals does
3 not even list “prejudice” as a factor to consider. *See Sec. Farms*, 124 F.3d at 1008. “Prejudice”
4 might be considered as one of the unenumerated “other factors” alluded to in that opinion, but
5 the Second Circuit case from which the *Security Farms* court adopted the enumerated factors
6 itself lists some “other factors,” none of which includes prejudice to the non-moving party. *See In*
7 *re Orion Pictures Corp.*, 4 F.3d 1095, 1101 (2d Cir. 1993) (listing factors used by the district
8 courts in that circuit to date)). The Court has been unable to find a case from any court of
9 appeals listing “prejudice” to the non-moving party as a factor to consider when determining the
10 timeliness of a motion to withdraw the reference. Defendant cites only to a few district court
11 decisions from other circuits where lack of prejudice was invoked as a reason to permit a late
12 motion (under Bankruptcy Rule 5011, which, unlike Local Bankruptcy Rule 5011, does not list
13 any standard for timeliness). Those decisions all appear ultimately to stem from a 1986 decision
14 in the Southern District of New York where the district judge granted a motion to withdraw the
15 reference based on “considerations of judicial economy.” *See Interconnect Tel. Servs., Inc. v.*
16 *Farren*, 59 B.R. 397, 402 (S.D.N.Y. 1986). That court had noted a lack of prejudice to the non-
17 moving party, but it did not appear to base its ruling primarily on that fact. *See id.* No court of
18 appeals appears to have cited *Interconnect* as to the relevant issue.

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

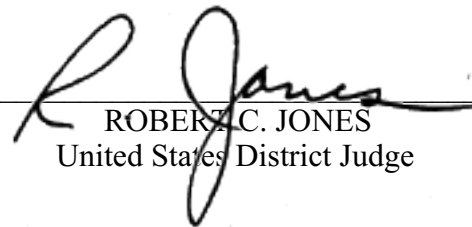
CONCLUSION

IT IS HEREBY ORDERED that the Motion to Withdraw Reference (ECF No. 2) is DENIED.

IT IS FURTHER ORDERED that the Clerk shall close the case.

IT IS SO ORDERED.

Dated this 19th day of November, 2014.


ROBERT C. JONES
United States District Judge